Tentative Rulings for October 4, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG03138 ***Woods et al. v. Central Valley Real Estate et al.*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG01657 ***Amador v. Bank of America, et al*****. is continued to Tuesday, October 18, 2016, at 3:30 p.m. in Dept. 502.**

16CECG00040 ***Miller v. Benner*** **(Motion to permit financial discovery ONLY) is continued to Tuesday, October 18, 2016 at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(30)

Re: ***The Best Service Co. Inc. v. Todd Spencer***
Superior Court No. 16CECG01335

Hearing Date: Tuesday October 4, 2016 (**Dept. 402**) **3:00 p.m.**

Motion: Defendants Melissa Oberti's Motion to Compel

Tentative Ruling:

To grant motion to compel *if proof of service of this motion is provided*.

To deny request for sanctions.

Plaintiffs are granted 20 days to produce requested documents, without objections.

Explanation:

Motion to Compel – Request for Production of Documents
A party is entitled to obtain discovery regarding any unprivileged matter that is relevant to the pending action. (Code Civ. Proc., § 2017.010.) Code of Civil Procedure section 2031.010, subsection (b), allows a party to an action to demand the opposing party produce relevant, unprivileged documents for inspection and copying. A party who has propounded a request for documents may move for a motion to compel where the opposing party fails to timely respond; is must comply with Code of Civil Procedure section 1005. (Codes Civ. Proc., §§ 2031.300; 1005.) When a party has not responded to requests for production, the opposing party waives all objections, including privilege and work product. (Code Civ. Proc., § 2031.300.)

Here, Defendant's request for production seeks documents that evidence the dates and amounts of loan payments. (Harris Dec, Ex. A p3.) Since this case revolves around breach, the requested documents are "relevant to the subject matter involved…" as required under Code of Civil Procedure section 2017.010. Therefore, these are all proper subjects for discovery.

On June 6, 2016 Defendants properly served Plaintiffs their request for production of documents. (Harris Dec, Ex.A p4.) The deadline was July 11, 2016. (*id.* at p2) Plaintiffs are *still* unresponsive. (Memo, p2 ln1.) However, Defendant fails to provide proof that Plaintiff was properly served with **this** motion. Therefore, motion granted *provided Defendant submit proof of service*.

Sanctions
A request for a sanction shall, **in the notice of motion**, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. (Code Civ. Proc., § 2023.040; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5-6; *Sole*

Energy Co. v. Hodges (2005) 128 Cal.App.4th 199, 210.) It is *not* enough simply to attach declarations or a transcript showing that the deponent refused to appear or answer questions on counsel's advice. (*Blumenthal v. Sup.Ct. (Corey)* (1980) 103 Cal.App.3d 317, 320; *Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1075-1076—issue may be raised for first time on appeal because prior notice of imposition of sanctions is mandated by due process].)

Here, Defendant's notice does not include a request for sanctions. And requesting sanctions via memorandum (see Memo) and declaration (see Harris Dec.) does not comply with due process. Therefore, requests for sanctions denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Lazaro Rueda v. Julio Ordonez***
Superior Court Case No. 15CECG01616

Hearing Date: Tuesday October 4, 2016 (**Dept. 402**) **3:00 p.m.**

Motion: Default Hearing

Tentative Ruling:

To set-aside default of Defendant Julio Ordonez

To Deny default judgment.

Explanation:

Default
The clerk is authorized to enter default upon proof of service. (Code Civ. Proc., § 585(b); *Yeung v. Soos* (2004) 119 Cal.App.4th 576.) Delivering copies of the summons and complaint to defendant personally constitutes "personal service" of summons. (Code Civ. Proc., § 415.10.)

Here, Plaintiff's proof of service for Defendant Julio Ordonez filed on 7/31/15 does not include the Complaint (Proof of service, filed: 7/31/15 ¶ 2(b).) Therefore, default must be set-aside.

Damages
The Court is required to render default judgment only "for that relief … as appears by the evidence to be just." (Code Civ. Proc., § 585(b).) Therefore, it is up to plaintiff to "prove up" the right to relief, by introducing sufficient evidence to support his or her claim. Without such evidence, the court may refuse to grant a default judgment for any amount, notwithstanding defendant's default. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434-1435.) It is The Court's responsibility to act as a "gatekeeper," ensuring that only the appropriate claims get through. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 691.)

Here, Plaintiff Rueda seeks damages for loss of earnings, medical expenses, pain and suffering, and emotional distress but he provides inadequate evidence to justify the amounts he seeks. Likewise, Plaintiff Moreno provides inadequate justification to support damages for emotional distress.

Loss of Earnings
Plaintiff is entitled to recover the reasonable value of working time lost on account of the injury. Thus, wages, commissions, bonuses and all other earnings that claimant has

lost are compensable damages. (*Bonneau v. North Shore R.R. Co.* (1907) 152 Cal. 406, 414.)

Here, Plaintiff Rueda requests $ 26, 000 for loss of earnings to date (Rueda Statement of damages, filed: 5/18/16 ¶ 2(c)). Rueda was unable to work from May 30, 2013 to April 2014 (Rueda Dec, filed: 8/23/16 ¶ 11); approximately 45 weeks. Rueda was paid $11.00 per hour (Rueda Dec, filed: 8/23/16 ¶ 9). Therefore, total employment damages are $19,800 less $ 960 in unemployment benefits (Rueda Dec, filed: 8/23/16 ¶ 9). Since Rueda presents no calculations to support increased damages, This Court cannot grant judgment in excess of $18,840. Further, Plaintiff provides no evidence such as payroll records, check stubs or payroll books to corroborate his declaration. Upon resubmission, Plaintiff Rueda must submit supporting evidence. Plaintiff Rueda must also submit calculations supporting *his* request or reduce damages to $18, 840.

Future Earnings
Gross amounts that plaintiff would have received in the future *but for the injury* are recoverable. This includes earnings and other payments, such as social security and retirement benefits, attributable to plaintiff's "lost years"—i.e., the time by which his or her *work life or life expectancy was shortened* because of the injury. (*Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 153; *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171-174.) But Plaintiff must establish that the prospective earnings loss is more than mere speculation. To establish "reasonable certainty" plaintiff must prove how long into the future he or she will be incapable of returning to work, or returning to the same job and the amount of money that could have been earned at his or her job but for the injury. (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656-657, disapproved on other grounds in *Coito v. Superior Court* (2012) 54 Cal.4th 480.) Probable earnings are ordinarily developed through testimony of an expert economist. (1) Plaintiff's *actual earnings* at the time of the injury; (2) Plaintiff's *work life expectancy* (*Fein v. Permanente Med. Group*, *supra,* 38 Cal.3d 137.); (3) anticipated job changes, promotions and salary raises; and (4) general economic trends are all factors considered. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451.)

Here, Plaintiff Rueda requests $ 25,000 for loss of future earnings (Rueda Statement of damages, filed: 5/18/16 ¶ 2(d)). However, he only gives This Court *one* factor to consider, his actual earnings at the time of injury (Rueda Dec, filed: 8/23/16 ¶ 9). Upon resubmission, Plaintiff Rueda must address the other three factors or remove this request.

Medical Expenses
A plaintiff injured by the wrongful act of another is entitled to recover as special damages the reasonable value of necessary medical expenses incurred prior to trial. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 409; *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640.) To be recoverable, a medical expense must be <u>both</u> *incurred* and *reasonable*. Thus, a plaintiff may recover no more than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 (emphasis added).)

Here, Plaintiff Rueda requests $50,000 in incurred medical expenses (Rueda Statement of damages, filed: 5/18/16 ¶ 2(a)), but his bills only total $6,071 (Garcia Dec, filed: 10/4/16 ¶ 14). Subtracting the Medi-Cal payment of $293.27 (Rueda Dec, filed: 8/23/16 ¶ 8), medical expenses total $5,777.73. Upon resubmission, Plaintiff Rueda must submit evidence to support his request for additional medical expenses or reduce it to $5,777.73.

Future Medical Expenses
Recovery may be had not only for loss already suffered, but also for loss reasonably certain to occur in the future. This is known as *prospective damage*. (Civ. Code § 3283; *Melone v. Sierra Ry. Co. of Calif*. (1907) 151 Cal. 113, 117; *Zerbo v. Electrical Products Corp.* (1931) 212 Cal. 733, 736.) The most frequent illustrations of prospective damage are future disability or suffering in personal injury actions (*Oliveira v. Warren* (1938) 24 Cal.App.2d 712.) A requirement of certainty cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award. (*Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 163, superseded on other grounds by *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139.) But where the uncertainty is too great, recovery will be denied. (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588.) Indeed, compensatory damages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery].)

Here, Plaintiff Rueda requests $100,000 in future medical bills (Rueda Statement of damages, filed: 5/18/16 ¶ 2(b)). Yet he submits *no* evidence to support his request. Without *any* evidence, we can only assume these damages are purely speculative, and there can be no award. Upon resubmission, Plaintiff Rueda must submit evidence to support his request for future medical expenses or remove it.

Pain and Suffering
A plaintiff is entitled to compensatory damages for physical pain and mental suffering that company or otherwise result from physical injury. These injuries constitute the principal elements of tort personal injury damage, and an award failing to compensate an injured plaintiff where pain and suffering was present is inadequate as a matter of law. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 893.) Pain and suffering is a unitary concept, encompassing all the physical discomfort *and* emotional trauma occasioned by an injury. Plaintiff is entitled to compensatory damages for all physical pain suffered and also for all resulting "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Id.*; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 981.) The absence of medical bills or medical testimony will not foreclose a recovery for pain and suffering. Indeed, even in the absence of any explicit evidence showing pain, the jury may infer pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain. (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 413.) The only guideline is "a reasonable amount based on the evidence and your

common sense" (*Greater Westchester Homeowners Ass'n v. City of Los Angeles* (1979) 26 Cal.3d 86, 103; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332.)

Here, Plaintiff Rueda requests $500,000 in pain and suffering (Rueda Statement of damages, filed: 5/18/16 ¶ 1(a)). But his medical bills only total $ 6,071 *at most* and he presents evidence of nothing more than a right elbow fracture (Rueda Dec, filed: 8/23/16 ¶ 6). Although a trier can reasonably infer pain and suffering, Rueda does not submit enough evidence to justify such a large request. Upon resubmission, Plaintiff Rueda must submit additional evidence to support his request, reduce it or remove it.

Emotional Distress
Emotional trauma as a result of tortiously-inflicted physical injury is compensable in the form of a "pain and suffering" award (see explanation above).

Here, Plaintiff Rueda prays for $500,000 in emotional distress damages (Rueda Statement of damages, filed: 5/18/16 ¶ 1(b)). However, Plaintiff Rueda does not plead any tortious act which could support damages for mental distress without a concurrent physical injury. (Complaint GN-1.) Therefore, Plaintiff Rueda is limited to recovering his claim for emotional distress as parasitic damages, or pain and suffering. Upon resubmission, this independent claim for emotional distress damages must be removed.

Loss of Consortium- emotional distress
Emotional distress damages are available under loss of consortium. However, they must rise to the level of "neurosis, psychosis, chronic depression, or phobia" to be sufficient to *substantially disturb* the marital relationship, and it must occur more often than on a temporary or superficial basis. (*Anderson v. Northrop Corp.* (1988) 203 Cal.App.3d 772, 780-781; *Estate of Tucker v. Interscope Records, Inc.* (9th Cir. 2008) 515 F.3d 1019, 1039.)

Here, Plaintiff Moreno requests $100,000 for emotional distress damages related to her loss of consortium claim (Moreno Statements of damages, filed: 5/18/16 ¶ 1(b)). However, she *only* asserts that Plaintiff Rueda would "be in bad moods, irritated, and stressed" (Moreno Dec, filed: 8/23/16 ¶ 6). This does not rise to the level of "ongoing neurosis, psychosis, chronic depression, or phobia." Upon resubmission, Plaintiff Moreno must justify her requests for emotional distress damages or they must be removed.

<u>DOEs</u>
In defaults, California Rules of Court section 3.1800 (a)(7) requires a dismissal of all parties against whom judgment is not sought. Additionally, no default judgment may be entered against someone served as a 'Doe' *unless* additional requirements are met. (*Pelayo v. JJ Lee Mgmt. Co., Inc.* (2009) 174 Cal.App.4th 484, 496.)

Here, Plaintiffs have not dismissed DOEs 1-25; they must be dismissed before judgment can be entered.

<u>dba</u>

A "nonentity is incapable of suing or being sued." (*Oliver v. Swiss Club Tell* (1963) 222 Cal.App.2d 528, 537.) A "dba" is a nonentity. Therefore, no default judgment can be rendered against it *apart from* the named defendant. (*Pinkerton's, Inc. v. Sup.Ct. (Schrieber)* (1996) 49 Cal.App.4th 1342, 1347-1349; *Providence Washington Ins. Co. v. Valley Forge Ins. Co*. (1996) 42 Cal.App.4th 1194, 1200.) "'Doing business under another name does not create an entity distinct from the person operating the business. The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner.'" (*Pinkerton's, supra,* 49 Cal.App.4th at p. 1348, quoting *Providence, supra* 42 Cal.App.4th at p. 1200.)

Here, Plaintiffs' proposed judgment is against Defendant in his individual capacity and "dba Intex renovations, and Intex Renovations" (Proposed Order, received 8/23/16 p1). However, Intex is a "dba," which is a nonentity. Therefore, no default judgment can be rendered against it. Upon resubmission, an amended judgment must be submitted which does not include Intex renovations.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Boyd v. J.H. Boyd Enterprises, Inc., et al.***, Superior Court Case No. 14CECG03792, consolidated with

J.H. Boyd Enterprises, Inc. v. Boyd et al., Superior Court Case No. 15CECG00915

Hearing Date: **October 4, 2016 (Dept. 402) 3:00 p.m.**

Motion: J.H. Boyd Enterprises, Inc.'s, Motion for Summary Judgment or Adjudication

Tentative Ruling:

To deny the motion. (Code Civ. Proc. § 437c(c), (f)(1).)

Explanation:

Initially, the court notes that defendants' objections are overruled. Evidentiary objections can only be made to the underlying evidence, not the facts contained within the separate statement. (See Cal. Rules of Court, Rule 3.1352, 3.1354.)

Summary adjudication of the fifth cause of action is denied because on 9/10/15 the court sustained the demurrer to that cause of action, did not grant leave to amend, and accordingly no amendment was subsequently filed. The cause of action effectively has been dismissed.

The motion is uncertain as to which parties it is brought against. The FAC names as defendants Ken and Susan Boyd, but individually and as trustees of the Boyd Trust. The first cause of action for breach of the promissory note is brought against all defendants. The Note is between the Boyd Trust and the JH Boyd Living Trust. There is no discussion of how Ken and Susan Boyd are to be held individually liable. The moving papers do not indicate against whom, specifically, the motion is brought. Rather, plaintiff seeks summary judgment in its favor in connection with its claims advanced in the FAC, as well as "certain affirmative defenses asserted by "Defendants," a term that is not defined anywhere. Since the Note is an obligation of the Boyd Trust, and there is no discussion of individual liability, summary judgment of the FAC's claims cannot be granted as to Ken and Susan Boyd individually. Ken and Susan Boyd signed continuing guarantees, but the court sustained the demurrer to the cause of action seeking enforcement of the guarantees.

Affirmative defenses

JHBE seeks summary adjudication of the Second Affirmative Defense for Failure of Conditions, the Ninth Affirmative Defense for Modification of Contract, the Tenth Affirmative Defense for Plaintiffs Breach, the Fifteenth Affirmative Defense for Waiver

and the Sixteenth Affirmative Defense for Discharge of Obligations. The memorandum includes no discussion of these affirmative defenses, and summary adjudication would be denied for that reason alone.

According to JHBE's separate statement, each of these defenses "is based upon Defendants' claim that there was a separate oral agreement between Ken Boyd on behalf of the Boyd Trust and Joseph Haig Boyd on behalf of the Joseph Haig Boyd Trust to permit the Boyd Trust to postpone indefinitely its obligation to repay the loan until the 20-acre Modoc property is either sold or developed. Because such an alleged agreement is unenforceable, this defense is legally invalid and must be adjudicated in Plaintiffs favor."

However, the separate statement references no evidence to support the conclusion that these affirmative defenses are premised *solely* on the alleged oral extension agreement. The court would expect to see reference to interrogatories asking defendants to state all facts upon which the affirmative defenses are based, and responses that discuss only the oral agreement. But there's nothing. And the language of the affirmative defenses themselves do not indicate that they are limited to the oral agreement. They don't even mention the oral agreement. The court cannot grant summary adjudication of these affirmative defenses on this showing, even if the court agreed with JHBE's substantive arguments.

First cause of action for breach of promissory note

A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co.* v. *Security Pacific Business Center* (1990) 222 Cal.App.3d 1371, 1387; 4 Witkin, Cal. Procedure (5th ed. 2010) Pleading § 515.)

The element primarily at issue in this motion is breach. Plaintiff establishes the making of a contract (the promissory note), and that the Boyd Trust has not paid off the note by the due date. Defendants contend, however, that they had an oral agreement with the J.H. Boyd Trust that the \ Boyd Trust would be allowed to extend the due date of the $2.5 Million Note as often as reasonably necessary to effectuate the sale of the 20-acre Modoc Property. Consideration for this agreement was putting closing of the 17-acre property before closing of the 20-acre Modoc property (possibly jeopardizing the sale), and Ken Boyd's waiver of his approximately $210,000 commission for the facilitation of the sale of his father's 17-acre property. This alleged oral agreement predated the execution of the written promissory note and the amendments thereto.

Parol evidence rule

> The parol evidence rule is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. It provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing. [fn] (*Casa Herrera, Inc.* v.

Beydoun (2004) 32 Cal.4th 336, 343, 9 Cal.Rptr.3d 97, 83 P.3d 497 (*Casa Herrera*).) "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." (Rest.2d Contracts, § 209, subd. (1); see *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433, 7 Cal.Rptr.2d 718.)
(*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n* (2013) 55 Cal.4th 1169, 1174.)

Plaintiff's showing as to the first cause of action is deficient because the moving papers include no discussion of the central issue of whether the note is an *integrated* agreement. Plaintiff concludes that it is, but does not discuss this issue.

To determine whether a document is an integrated contract not susceptible to modification by parol evidence the court considers "the language and completeness of the written agreement [,] the terms of the alleged oral agreement and whether they contradict those in writing, [and] whether the oral agreement might naturally be made as a separate agreement [.]" (*McLain v. Great Am. Ins. Cos.* (1982) 208 Cal.App.3d 1476, 1484, quoting *Mobil Oil Corp. v. Rossi* (1982) 138 Cal.App.3d 256, 266.)

The Note does not include an integration clause. However, the Note does appear to be a complete written agreement that includes numerous terms that make it appear to be a complete agreement. It provides that in the event of default in payment of principal or interest, the whole sum, at the option of the holder of the note, becomes immediately due and payable. It includes a 6% penalty for late payments. It also includes a provision for recovery of attorneys' fees upon default.

Arguably, however, the alleged extension agreement does not contradict the three writings executed by the parties. The Note provides that the principal is to be repaid on 9/1/09. The 6/11/08 Amendment to the note provides that the final due date was 9/1/11. The 12/15/10 Modification Agreement provides that beginning 9/15/11 a principal and interest payment of $175,000 shall be made on the 15th of each September until 2014, "on which date the unpaid Principal with unpaid interest thereon shall be due and payable in full."

The alleged oral extension agreement doesn't necessarily contradict the terms of the written agreements in that it doesn't set forth a different due date. Rather, it concerns extensions of the due date, something that is not specifically addressed in the written documents. That the due date was extended twice is evidence supporting the existence of the oral agreement.

Since the oral agreement was made prior to execution of the Note, it would be expected to be included in the written agreements. But in light of the history of business dealings between Ken and J.H. Boyd, including transacting business without written agreements (see Ken Boyd Dec. ¶¶ 6-12, 23-24), and the fact that they were father and son, this oral extension agreement might reasonably be an agreement that is not formalized.

Accordingly, the court cannot definitively conclude on this record that the oral agreement is barred by the parol evidence rule.

Statute of Frauds

Under Civil Code §1624(a)(7) a "contract, promise, undertaking, or commitment to loan or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending" is invalid if it is not in writing. Additionally, a mortgage given to secure performance of a promissory note is a contract relating to real property that triggers the Civ. Code § 1624(a)(3) statute of frauds.

Plaintiff does not establish that subdivision (a)(3) applies. While the note is secured by real property, and was made in connection with an intended real property transaction, the loan itself is not one for sale of real property. Plaintiff cites to no authority providing that (a)(3) would apply in this circumstance.

Subdivision (a)(7) does not apply either. The oral agreement is part of a loan for more than $100,000, and appears not to be primarily for personal, family or household purposes, but plaintiff does not show that it was made by a person engaged in the business of lending money. There is no analysis in the moving papers showing that this criteria is met in this case.

Unconscionability

Plaintiff next throws out the argument that the oral agreement is unconscionable because "if Defendants or their progeny (or their progeny's progeny) never get around to selling or developing the 20-acreModoc Avenue parcel, the obligation to pay back the $2.5 million debt (and accumulating interest) never matures." However, other than pointing out that courts may refuse to enforce unconfinable contracts (Civ. Code § 1670.5(a)), the moving papers include no analysis or discussion of whether the agreement is in fact unconscionable. There is no discussion of procedural or substantive unconscionability. Plaintiff fails to meet its burden as to this argument.

Fourth cause of action for judicial foreclosure

In light of its conclusion that the oral extension agreement is invalid, JHBE seeks to have the court adjudicate in its favor the amount owed under the promissory note and to order foreclosure of the property.

The moving papers rely entirely on the analysis with respect to the first cause of action as entitling JHBE to relief under the fourth cause of action. Accordingly, since the motion is denied as to the first cause of action, it should be denied as to the second cause of action as well.

Additionally, the motion should be denied as to the fourth cause of action even if the motion is not denied as to the first because JHBE's memorandum includes no

discussion of the elements or requisites for the court to order judicial foreclosure. JHBE fails to meet its burden of showing it is entitled to judgment on this cause of action.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Kaweah Construction Co. v. Steven McGee, et al.***
Superior Court Case No. 15CECG00625

Hearing Date: October 4, 2016 (Dept. 402) **3:00 p.m.**

Motion: Stay

Tentative Ruling:

To grant. The instant action is stayed pending the outcome of the appeal of the underlying action.

Explanation:

Trial courts have inherent power to stay a malpractice action pending the outcome of the underlying suit, as issues in the underlying action typically impact the issues in the malpractice action. (See, e.g., *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 513; *Adams v. Paul* (1995) 11 Cal.4th 583, 593; *Rosenthal v. Wilner* (1988) 197 Cal.App.3d 1327, 1333-1334.)

In the case at bench, Defendants move to stay the instant action pending the outcome of Plaintiff's appeal of the underlying action. Plaintiff's appeal involves the mechanic's lien managed by Defendant McGee. The resolution of that issue directly impacts the instant action, specifically the viability of all or some of the damages alleged in the present case. Accordingly, the motion is granted.

Taking judicial notice of a document is not the same as accepting the truth of the document's contents. (*Herrera v. Deutsche Bank Nat. Trust Co*. (2011) 196 Cal.App.4th 1366, 1375; *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374.) A court may only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.)

Here, Defendants seek judicial notice of Richard Evans's declaration filed in United States Land and Cattle Company, Inc.'s bankruptcy. Defendants appear to seek judicial notice of the truth of the contents of the declaration, which is improper. No reason has been presented by Defendants, or is apparent to the Court, for taking judicial notice of the *existence* of the declaration. Accordingly, the Court declines to take judicial notice as requested.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Gomez v. Prieto***
Superior Court Case No.: 15CECG02745

Hearing Date: October 4, 2016 (**Dept. 402**)

Motion: By Defendants Luis Esteban Martinez and Mark Quant Chu dba Big Realty for an order determining their settlement with Plaintiff Elvia Esquivel Gomez is in good faith

Tentative Ruling:

To grant. The Court will execute the proposed order which has been submitted.

Explanation:

The settlement meets the requirements of *City of Grand Terrace v. Sup.Ct. (Boyter)* (1987) 192 Cal.App.3d 1251, 1261.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/03/16
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Reyes v. Barnell***
Court Case No. 15CECG00659

Hearing Date: **October 4, 2016 (Dept. 402) 3:00 p.m.**

Motion: Defendants David and Joann Bernel's Motion for Judgment on the Pleadings

Tentative Ruling:

To grant the motion as to the First, Second, Fifth and Seventh causes of action, without leave to amend. To grant the motion as to the Sixth cause of action, with leave to amend, but such leave is conditioned on allowing plaintiffs to bring a cause of action for breach of contract, *only*. Plaintiffs are granted 10 days' leave to file the Second Amended Complaint, with the time to run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

Explanation:

Request for Judicial Notice:

Defendants ask the court to take judicial notice of the First Amended Complaint ("FAC"), the recording and transcript of the unlawful detainer trial in Case # 15CECG01766 (*Kutnerian Enterprises v. Reyes*), the judgment from that trial, and the remittitur from the Reyeses' appeal of that judgment. This is appropriate.

A motion for judgment on the pleadings lies where the court can take judicial notice of a prior action between parties as the basis for collateral estoppel (or res judicata) in the present action. (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226.) Collateral estoppel, or issue preclusion, prevents relitigation of previously decided issues. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, *reh'g denied (Aug. 12, 2015)*.) It applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825.) Furthermore, it can be raised by a party who was not a party or privy in the first suit, i.e., someone in the Bernels' position. (*Id.* at pp. 824-825—"Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding" (emphasis in the original, internal quotes and citations omitted.)

Plaintiffs argue the defendants' request for judicial notice exceeds the proper scope of such notice, as the court cannot notice of the truth of a factual finding made by another court to resolve a disputed of fact in this case. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485; *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) They argue the court can only notice the judgment actually entered, i.e., that the court ordered possession of the property restored to the landlord.

However, the cases plaintiffs rely on did not deal with judicial notice for purposes of collateral estoppel. Thus, the cases they cite are inapposite. When the court takes judicial notice for purposes of collateral estoppel, it is not taking judicial notice of the truth of the factual assertions made by the court in the prior action; instead, it is merely taking notice that the fact in issue in the later action "[has] been previously adjudicated after a contested adversarial hearing, and, then, in accordance with collateral estoppel doctrines, [does] not permit the same issue to be litigated again." (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485, brackets added.)

As the court stated in *Hawkins v. SunTrust Bank* (2016) 246 Cal.App.4th 1387 (206 Cal.Rptr.3d 681), cited by defendants:

> As a general rule factual findings in a judgment are not the proper subject of judicial notice. *That does not end our inquiry.* "'Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully.' [Citation.] In other words, *even though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action*." (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148, 14 Cal.Rptr.3d 109.)
>
> (*Hawkins v. SunTrust Bank,* 206 Cal.Rptr.3d 681, 685, emphasis added.)

Therefore, the court has judicially noticed the following facts:

- The Reyeses were the tenants of the Kutnerian defendants, as were the Bernels.
- Kutnerian Enterprises filed an unlawful detainer action against the Reyes, which resulted in a judgment in favor of Kutnerian Enterprises and against Enrique Reyes and Guadalupe Reyes.
- The judgment in the unlawful detainer action was appealed by the Reyeses and was affirmed on appeal, and has become final.
- The issue of whether Kutnerian was responsible for the cut off of electricity to Reyes was litigated in the unlawful detainer action. (Notice of Motion ("NOM," Ex. 2.) Mr. and Mrs. Reyes (defendants in that action) had attempted to establish that the landlord had breached the warranty of habitability due to the electricity cut-off, and specifically that this was a violation of Civil Code section 789.3, and that the Bernels were the landlord's agents, and thus the landlord had breached the warranty.
- Pertinent factual findings crucial to the court's ruling in the unlawful detainer trial (all from page 116 of the trial transcript):

- The Reyeses' travel trailer was self-contained as to sewer, water and electricity. (NOM, Ex. 2, p. 116:2-5.) This factual finding was important to determine whether the trailer was habitable without an electrical connection, as plaintiffs were arguing a breach of the warranty of habitability.
- Mr. Kutnerian offered them an electrical outlet, but instead the Reyeses made an agreement with Mr. Bernel for providing electricity. (*Id.*, p. 116:5-8.)
- Mr. Bernel was "not an employee of Mr. Kutnerian nor is he an agent of Mr. Kutnerian." (*Id.*, p. 116:8-10.)
- The Bernels cut off the electricity. (*Id.*, p. 116:16-18.)
- Kutnerian was not obligated to coerce or force the Bernels to reestablish the electrical connection, as the written lease obligated the Reyeses to provide for their own water and electricity and to pay for maintenance of those utilities. (*Id.,* Ex. 2, 116:18-24.)

All of the factual findings noted from page 116 of the unlawful detainer trial transcript were crucial to the court's ultimate ruling against the Reyeses. These findings all center on the same issue that is central to the Reyeses claims against the Bernels in this action: the agreement regarding provision of electricity to the Reyeses and its relation to the Reyeses' tenancy, and the cut-off of that electricity by Mr. Bernel.

Elder Abuse:

Plaintiffs allege that the defendants' act of shutting off their electricity was "unlawful, unconscionable, reckless, intentional, willful and designed to cause Plaintiffs to suffer through the winter without electricity." They allege this constituted elder abuse pursuant to Welfare and Institutions Code section 15610.07. That statute, at subdivision (a)(1) states that elder abuse means "physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering."[1] Plaintiffs focus on the reference in subdivision (a)(1) to "other treatment" resulting in physical harm, pain, or mental suffering and they argue that defendants' acts of shutting off the electrical power fits under that broad definition. Plaintiffs' reliance on this phrase and this statute to sustain their elder abuse cause of action is misplaced.

Welfare and Institutions Code section 15657, and not section 15610.07, is the authorizing statute for a civil cause of action for elder physical abuse or neglect under Article 8.5 of the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act" or "Act"). Each of the various authorizing statutes under Article 8.5 point to the specific definitional statute that controls. In the case of a cause of action for elder *physical* abuse, Section 15657 requires a plaintiff to allege physical abuse *as defined in*

[1] It appears from both the FAC's allegations and plaintiffs' opposition that they are attempting to allege elder abuse under subdivision (a)(1) only, and not neglect or financial abuse under subdivisions (a)(2)-(3). Thus, this analysis deals only with subdivision (a)(1) and the definition of "physical abuse" in Welfare and Institutions Code section 15610.63.

Section 15610.63. Thus, the definition provided in section 15610.63 is the controlling statute, and it provides that elder physical abuse includes *only*: 1) physical assaults or other conduct involving actual physical contact with the elder (i.e., assault, battery, assault with a deadly weapon, sexual assault, or physical or chemical restraint; see subdivisions (a), (b), (c), (e) or (f)); or 2) "unreasonable physical constraint or prolonged or continual deprivation of food or water" (see subdivision (d)). Defendants' alleged act of cutting off the electricity is not sufficient to allege any of these, and plaintiffs appear to concede this.

The general definition statute for "abuse of an elder or dependent adult" plaintiffs rely on, Section 15610.07, and its broad reference to "other treatment with resulting physical harm or pain or mental suffering" is not controlling. In fact, Section 15610.07 is only mentioned in one statute under Article 8.5, and that is section 15657.03, which allows the elder or dependent adult, or their conservator, to seek a protective order if the elder/dependent adult has "suffered abuse as defined in Section 15610.07." Therefore, the definition as stated in section 15610.07 is simply immaterial in stating this cause of action.

Thus, this cause of action fails. While liberal leave to amend is generally allowed, plaintiffs do not indicate they could allege any act meeting the definition of "physical abuse" under the Elder Abuse Act. It is the opposing party's responsibility to show how the pleading can be amended to cure its defects. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Therefore, the motion must be granted as to this cause of action, without leave to amend.

Violation of Civil Code Section 789.3(a):

Liability under Civil Code section 789.3, subdivision (a) is predicated on proving that plaintiff's landlord interrupted or terminated the tenant's utility service furnished by the landlord with intent to terminate the tenant's occupancy. (*Otanez v. Blue Skies Mobile Home Park* (1991) 1 Cal.App.4th 1521, 1526.) A landlord can be held liable under Civil Code section 789.3 where it was the landlord's agent, and not the landlord, who turned off the utilities. (*Id.* at p. 1523.)

The issue of agency was critical to the issues litigated regarding the electricity cutoff in the unlawful detainer action, and was fully contested in an adversarial hearing. The court clearly found that Mr. and Mrs. Bernel were not agents or employees of the landlord, that the landlord had no duty to provide electricity to plaintiffs or any duty to force Mr. Bernel to provide electricity once he had severed the connection. Plaintiffs' opposition argument clearly shows they want to relitigate this issue in this current action. However, this is not allowed under the doctrine of collateral estoppel. (*Western Mutual Ins. Co. v. Yamamoto, supra,* 29 Cal.App.4th at p. 1485.) Plaintiffs argue, without real explanation, that the issue in this case was not identical to the issue in the unlawful detainer case, but they are apparently confusing collateral estoppel with the doctrine of res judicata, as the only case they cite for this proposition, *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, deals only with res judicata and not collateral estoppel. Thus, it is inapposite. The motion must granted on this cause of action, without leave to amend.

Negligence:

This cause of action alleges that defendants owed plaintiffs a duty of care while acting as fiduciaries to plaintiffs, and they have breached that duty of care. Defendants argue this is conclusory, and that there is no fiduciary relationship alleged simply by virtue of an arm's length contract the parties had about supplying electricity. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 388—contract between two parties of equal bargaining power; *Wolf v. Superior Court* (2003) 106 Cal.App.4th 625, 32-33, *as modified on denial of reh'g (Mar. 20, 2003)*—no fiduciary relationship created by a contract that created debtor/creditor relationship.)

Plaintiffs' argue that this was not an arm's length contract because the landlord's offer to rent the property "was not open to the general public." However, that is not a requirement for a contract to be regarded as arm's length. Rather, the concept has to do with an agreement where each side is acting in their own self-interest and not subject to pressure or duress from the other party. (See, *e.g., Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 716—arm's length contract is one where the parties have "opportunity to accept, reject or modify the terms of the agreement….")

Plaintiffs' allegations that they were elderly, and that Mrs. Reyes became disabled *after the contract was made*, is not enough to support an allegation that Mr. and Mrs. Bernel were in a fiduciary role at the time the contract was formed, or afterward. Plaintiffs' other arguments continue to rely on their agency allegations, and that the Bernels should be "held liable for torts stemming from the landlord's liability, despite the fact that he acts for a principal." However, plaintiffs cannot rely on their allegation that the agreement to provide electricity through the Bernels' meter was with all defendants, and then rely on landlord liability to make the Bernels liable in tort. This court has found the Kutnerian defendants *not* liable on any of plaintiffs' theories, which was why summary judgment was granted in their favor. Thus, the Bernels cannot be held liable in tort on the strength of this allegation.

Other than being neighbors and entering into the contract over the provision of electricity, no other relationship is alleged between the Reyeses and the Bernels. Nor is there an independent tort duty to provide electricity that would give rise to a negligence claim just because Mr. Bernel cut off the power to the Reyeses. The fiduciary relationship is not factually supported, nor did the opposition brief suggest how plaintiff could amend in order to do so. As with demurrer, the court does not "assume the truth of contentions, deductions, or conclusions of fact or law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966.) The motion for judgment on the pleadings must be granted.

However, the court grants leave to amend, but *only* in order to allow plaintiffs to allege a breach of contract claim. They have clearly alleged a contract with the Bernels regarding the provision of electricity from the Bernels to the Reyeses, and have alleged the Bernels breached that agreement. These allegations are not contradicted by the findings in the unlawful detainer action which this court has judicially noticed.

Just as with demurrer, leave to amend is routinely granted, even when shortly before trial, where the facts alleged support the amendment. (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1851.) However, in granting leave to amend the complaint, the court may impose "any terms as may be just." (Code Civ. Proc., § 472a, Subd (c).) Here, it is just to allow plaintiff to state the only claim that appears to be implicated by the facts alleged.

Nuisance

This cause of action alleges that defendants' termination of the electrical utility constitutes a nuisance within the meaning of Civil Code section 3479 and Code of Civil Procedure section 731, in that they deprived plaintiffs of safe, healthy and comfortable use of the premises.

Nuisance liability is based on the defendant's commission of a negligent or intentional tort that interferes with the plaintiff's free use and enjoyment of his property. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 101.) However, as alleged, the only duty the Bernels owed was a contractual one arising solely out of the alleged agreement between the Reyeses and the Bernels. "Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.)

Plaintiffs again rely on their allegation that the agreement regarding electricity was with all defendants and that all defendants were agents of the other. However, as dealt with above, plaintiffs may not litigate these issues again. The findings in the earlier action were that the contract was not with the Kutnerian defendants and the Bernels do not share in landlord liability in any way, and furthermore, that the landlord was *not* liable for the electricity cutoff and had no obligation to provide electricity to the Reyeses. Again, at best, plaintiffs allege a breach of contract. In their argument plaintiffs also rely on their allegation of a fiduciary relationship, and this has also been dealt with above.

Plaintiffs have failed to allege any tort duty owed by the Bernels, and the alleged breach of contract by the Bernels does not support this nuisance claim. Their reliance on *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903 is also ineffective, as that case dealt with a tenant's rights against a landlord and the landlord's agent under a residential lease, which is inapposite. The motion must granted as to this cause of action, without leave to amend.

Intentional Infliction of Emotional Distress

Plaintiffs allege that the Bernels' termination of the electrical connection was knowing, intentional, and willful, and done with a reckless disregard of the probability of causing plaintiffs emotional distress, and they suffered extreme mental anguish and emotional and physical distress.

"Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at p. 515.) Plaintiffs have failed to allege any independent duty the Bernels owed to them, as they were not fiduciaries and they were not agents of the landlord. There is no legal tort duty to provide electricity. The termination of the electricity did not "interfere with Plaintiffs' tenancy," as they argue, since, as has already been litigated in the unlawful detainer action, this was not a part of plaintiffs' tenancy agreement but was a separate agreement with the Bernels.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Stevenson v. Community Medical Centers***
Court Case No. 14CECG02305

Hearing Date: **October 4, 2016 (Dept. 402) 3:00 p.m.**

Motion: Plaintiffs' Motion for Leave to Amend Complaint

Tentative Ruling:

To grant in part and deny in part. Plaintiffs are given leave to amend the complaint to add the new causes of action for fraud/intentional misrepresentation, concealment, negligent misrepresentation, and aiding and abetting, *with changes as ordered below*.

Plaintiffs are given leave to amend the complaint to add punitive damage allegations and prayers *as to the Hospital defendants only*, as to the proposed Fifth, Sixth, and Eighth causes of action, and to the Survival cause of action, but not as to the proposed Seventh (Negligent Misrepresentation) cause of action. Their request to add these allegations and prayers as to the Chaudhry defendants is denied, without prejudice.

Instructions on Amending (Paragraph and page numbers refer to the Proposed First Amended Complaint submitted with the Motion): In filing the First Amended Complaint, plaintiffs must 1) delete Paragraphs 41, 55, 63, and 69 (punitive damage allegations in the First, Second, Third and Fourth causes of action); 2) delete Paragraph 115 and the prayer at page 42:2-7 (punitive damages as to the Negligent Misrepresentation cause of action); 3) delete the name of defendant Ramesh B. Pamula, M.D. in the Third cause of action, and reference to Larry Cohler, M.D. from the entire complaint; 4) allege the new causes of action *separately* against the Chaudhry defendants and the Hospital defendants.

Rulings on evidentiary objections are as follows:

- Plaintiffs' Objections to Hospital defendants' evidence: To overrule all objections
- Plaintiffs' Objections to Chaudhry defendants' evidence: To overrule all objections.
- Hospital Defendants' Objections: Overrule all except Objections 14, 22, 45, 47 and 62, which should be sustained.
- Chaudhry Defendants' Objections: Sustain all except Objections 1 and 105, which should be overruled.

Explanation:

Motion to Amend to Add Causes of Action

Judicial policy favors resolution of all disputed issues between parties in the same lawsuit, therefore the court's discretion will usually be exercised liberally to permit

amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Plaintiffs have complied with the technical requirements under California Rules of Court, Rule 3.1324 for a motion to amend. The policy of liberal allowance of amendment is in favor of granting this motion. However, the amendment cannot be allowed exactly as plaintiffs propose. The necessary revisions are explained after the explanation of the ruling on the motion to amend pursuant to Code of Civil Procedure section 425.13.

Explanation re Objections

The court has considered evidence from the depositions from the Arteaga/Perez case, as defendants were present at all depositions and represented by the same counsel representing them in this action.

Plaintiffs' objections on the grounds that the cited evidence was improperly attempting to have the court weigh the evidence (with citation to *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 539) were not well taken as this is not an evidentiary objection, but rather is the court's standard used in ruling on this motion. Namely, on this motion the court cannot "engage in weighing conflicting evidence, making credibility determinations, or drawing inferences from facts in assessing whether a plaintiff has made a sufficient showing of a prima facie case of entitlement to punitive damages." (*Aquino v. Superior Court* (1993) 21 Cal.App.4th 847, 856—"[I]n order to give effect to the statutory language requiring opposing affidavits to be considered along with supporting ones, any *uncontradicted evidence* presented in opposition should be considered to fill in any blank areas in the plaintiff's showing, in order to give the court as complete a factual picture as possible." See also *Looney, supra.*) Thus, if defendants' evidence *conflicts* with plaintiffs' it will not be weighed; if opposition evidence is *uncontradicted*, then it can be regarded as "filling in blanks," and can be considered part of the "complete factual picture." That does not mean defendants' conflicting evidence is subject to an evidentiary objection under *Aquino* and *Looney*. Plaintiffs' other grounds of evidentiary objections are overruled.

Many of the objections of the Hospital defendants and the Chaudhry defendants were to the same evidence. These have been handled differently, however, because the impact of this evidence is quite different as between the two. Much of the evidence is relevant and admissible to support plaintiffs' allegations that the Hospital defendants were on actual and/or constructive notice of concerns about Dr. Chaudhry, and yet continued to allow him hospital privileges and also to remain in his position of power.

However, this same evidence is objectionable as to Dr. Chaudhry, as it is or could be used as character evidence to prove his conduct related to Ms. Stevenson's surgery and care. Thus, even where the defendants objected to the same evidence, the rulings were different.

Motion to Amend Pursuant to CCP § 425.13

A plaintiff making a motion to amend to claim punitive damages must make a sufficient prima facie showing of facts to sustain a favorable decision if the evidence is

credited. (*Aquino, supra,* 21 Cal.App.4th at p. 853; *Looney, supra,* 16 Cal.App.4th at pp. 538-539.) The trial court should not make any factual determination or "become involved in any weighing process beyond that necessarily involved in deciding whether a prima facie case for punitive damages exists." (*Looney, supra,* 16 Cal.App.4th at p. 539.) In considering the opposing parties' evidence and affidavits, the court's "consideration of the defendant's opposing affidavits does not permit a weighing of them against the plaintiff's supporting evidence, but only a determination that they do or do not, *as a matter of law,* defeat that evidence." (*Id.*, emphasis in the original.) Nevertheless, in reviewing the declarations and supporting evidence, the trial court must be mindful that the evidence and all inferences that can be drawn from it must meet the higher "clear and convincing" standard. (*Id.*) Thus, Plaintiffs must produce evidence sufficient to show, by a clear and convincing amount, that it could make a prima facie case that defendants are guilty of "oppression, fraud, or malice."

Here, Plaintiffs have produced evidence from the *Arteaga (Perez) v. Fresno Community Regional Medical Center* case showing that, at least until mid-2012: 1) Dr. Chaudhry had a habit of handing the closing of surgeries he performed over to a physician's assistant; 2) Dr. Chaudhry was accused of drinking during working hours, including being intoxicated during surgery; and, 3) because Dr. Chaudhry's business was so important to the hospital, the Hospital defendants were slow to investigate complaints about him. Plaintiffs' position is that the evidence shows that Defendants were "ignoring misconduct and concealing and misrepresenting information related to patient safety for economic gain through a system of administrative cover-ups."

Defendants both argue that the evidence cannot be the legal basis to show a propensity to commit the negligence with respect to the surgery at issue in this action because it constitutes inadmissible character evidence. (Evid. Code §1101, subd. (a).) The court agrees as to the Chaudhry defendants. Therefore, with the sustaining of most of their evidentiary objections, there is no evidence sufficient to grant this motion.

As to the Hospital defendants, however, the evidence regarding alcohol use and intoxication, allowing the Physician's Assistant to close the sternum without supervision, and leaving the OR prematurely are not presented or considered to prove that this conduct occurred during Ms. Stevenson's surgery (i.e., improper character evidence). Rather, plaintiffs are asking the court to consider it for the purpose of showing that the hospital defendants were aware of this conduct and yet continued to extend privileges to Dr. Chaudhry and thus held him out as providing "safe medical care without inappropriately jeopardizing Plaintiff's health and safety," and continued to keep him in a place of power and influence over the hospital system and over staffing decisions. In short, the theory as to the Hospital defendants is that they willfully ignored or disregarded the information they had about Dr. Chaudhry's behavior and held out to its patients that it was safe for plaintiffs to undergo surgery performed by him. Plaintiffs relied on these representations in electing to undergo the surgery. The causal connection between the allegedly despicable behavior by Dr. Chaudhry and decedent's decision to undergo surgery done by Dr. Chaudhry is that if the Hospital had acted on what it knew she would not have been presented with the choice of having Dr. Chaudhry as the surgeon. *That* is the impact plaintiffs are alleging the Hospital defendants' behavior had on them.

However, the Hospital defendants' point is well taken as to the issues of Dr. Chaudhry being accused of leaving surgeries early and allowing his PA to finish surgeries. Plaintiffs' own evidence – i.e., their Exhibit 11, from the investigative file of the California Department of Public Health ("CDPH") – shows that the Hospital addressed these issues in 2012. By asking that this evidence also be considered, the Hospital defendants are not attempting to contradict plaintiffs' assertions that these problems existed, but they are merely filling in a "blank area" in the plaintiffs' showing "in order to give the court as complete a factual picture as possible." (*Aquino v. Superior Court, supra*, 21 Cal.App.4th at p. 856.) With this evidence considered, it does not appear that these behaviors by Dr. Chaudhry support plaintiffs' contention that the hospital was guilty of malice, oppression or fraud in continuing to grant him privileges. Plaintiffs did not present any evidence that the hospital's corrective measures were insufficient or ineffective.

The alcohol allegations, however, are different, as neither the CDPH investigation nor the Hospital's corrective measures dealt with this issue at all. As to the Hospital defendants, this is not being considered to prove the doctor's conduct during the Stevenson surgery. Plaintiffs' evidence establishes that the Hospital defendants received numerous reports that Dr. Chaudhry was intoxicated during surgery. This is knowledge that would or should reasonably have bearing on a hospital's decision to grant privileges and employment. Plaintiffs should be allowed to amend their complaint to add allegations regarding alcohol abuse.

Changes Required to the Amendment

First, the proposed amended complaint seeks to add punitive damages only to the four new causes of action; plaintiffs emphasize this fact in their Reply brief (pp. 3:24-4:2). Prayers for punitive damages are only added to the new causes of action and the Survival action. However, the Proposed FAC adds allegations regarding punitive damages (i.e., that conduct was despicable, committed maliciously, fraudulently, etc.) to the First, Second, Third and Fourth causes of action, namely Paragraphs 41, 55, 63, and 69. If punitive damages are not being sought on these causes of action, then these allegations serve no purpose; they are surplusage which can only cause confusion. Thus, plaintiffs are instructed to delete these paragraphs entirely when filing the First Amended Complaint ("FAC").

Second, as the Chaudhry defendants pointed out, no punitive damages can be awarded on a cause of action for negligent misrepresentation. (*Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 656-657; *Reid v. Moskovitz* (1989) 208 Cal.App.3d 29, 32.) Thus, when filing the FAC, plaintiffs must delete Paragraph 115 and the prayer at page 42:2-7.

Third, plaintiffs are instructed to delete the name of defendant Ramesh B. Pamula, M.D. in the Third cause of action, as plaintiffs have dismissed him (without prejudice) from this cause of action. They should also be instructed to delete reference

to Larry Cohler, M.D. from the entire complaint, as they have dismissed him entirely, with prejudice.

Fourth, for sake of clarity, since the punitive damage allegations and prayers are only being allowed as to the Hospital defendants, plaintiffs must allege these causes of action *separately* against the Chaudhry defendants and the Hospital defendants.

Plaintiffs' request for denial to be without prejudice:

To the extent plaintiff is asking the court to make some kind of advisory opinion as to "allowing more discovery," this request must be denied. Plaintiffs are allowed discovery within the scope of the Discovery Act, just as any civil litigant.

To the extent plaintiffs are not seeking a "discovery order" but are simply trying to ensure they can renew their motion under section 425.13, their citation to the footnote in *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704 does not support their request. The Court was simply noting there that if the *allegations* of the complaint were missing elements, but the *evidence* tended to support that plaintiff could readily supply those allegations, then plaintiff should be allowed to amend "to include the missing allegations." (*Id.* at p. 719, *fn 5*.) This is not support for allowing a renewed motion to amend under section 425.13 if it is denied because insufficient *evidence* is presented, as here.

Even so, there is nothing in section 425.13 prohibiting a plaintiff from renewing the motion to amend. Therefore, it does not appear the court is prohibited from denying the motion without prejudice. However, there is still the statutory deadline to consider. In *Freedman v. Superior Court* (2008) 166 Cal.App.4th 198 the court found that "section 425.13(a) demands strict adherence to the Legislature's chosen deadline." (*Id.* at p. 207.) Here, the current motion was timely, as the two-year deadline (which was the earlier of the two potential deadlines) was not up until August 7, 2016, and this motion was filed on August 5, 2016. But any subsequent motion would not be timely. The court has discretion, where necessary "in the interest of fairness and justice," to relieve plaintiff from an "impossible or impracticable" time limitation. (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1638, *as modified (Mar. 14, 1996)*.) However, the court in *Goodstein* stated that plaintiff "bears a heavy burden" to justify relief from the statutory time limit. (*Id.* at p. 1645.) Plaintiff must show that:

> (1) she was unaware of the facts or evidence necessary to make a proper motion under section 425.13 more than nine months prior to the first assigned trial date, (2) she made diligent, reasonable and good faith efforts to discover the necessary facts or evidence to support such a motion more than nine months prior to the first assigned trial date, (3) after assignment of the trial date she made reasonable, diligent and good faith efforts to complete the necessary discovery, (4) she filed her motion under section 425.13 as soon as reasonably practicable after completing such discovery (but in no event more than two years after the filing of her initial complaint) *and* (5) Goodstein will suffer no surprise

> or prejudice by reason of any shortened time period and will be given every reasonable opportunity to complete all necessary discovery in order to prepare to meet Pittman's punitive damage allegations.
>
> (*Id.* at p. 1646.)

In *Freedman, supra*, the appellate court vacated a trial court order granting plaintiff leave to amend where plaintiff had not met all five *Goodstein* factors. Thus, even though the denial of this motion will be made "without prejudice," if plaintiffs do renew their motion to amend, this does not relieve them of the requirement to show they have met all five of the *Goodstein* factors.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/03/16

(Judge's initials) (Date)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Marcum v. St. Agnes Medical Center et al.***, Superior Court Case No. 15CECG01327

Hearing Date: **October 4, 2016 (Dept. 403)**

Motion: Nareddy's Demurrer and Motion to Strike Third Amended Complaint

Tentative Ruling:

Demurrer: To overrule as moot as to the first cause of action. To overrule as to the second and fourth causes of action. (Code Civ. Proc. § 430.10(e).)

Motion to Strike: To grant the motion to strike paragraphs 65, 66, 67, and the prayer for punitive damages and attorneys' fees, without leave to amend. (Code Civ. Proc. § 436.)

Nareddy shall file his answer to the Third Amended Complaint ("TAC") within 10 days of service of the order by the clerk.

Explanation:

First, the court notes that plaintiff's opposition will not be considered because it was filed late.

Demurrer

The demurrer is moot as to the first cause of action. By order dated September 26, 2016 the court struck Nareddy from this cause of action.

Nareddy demurs and moves to abate the action because plaintiff failed to join all heirs – namely, plaintiff's brother Dan Marcum. However, Nareddy cites to no authority supporting the sustaining of a demurrer on this ground, or providing that the action must be abated. The authorities cited indicate that a defendant who fails to join an unnamed heir may face liability to the heir. (See *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801 *Gonzales v. Southern California Edison Co.* (1999) 77 Cal.App.4th 485.) If defendants are concerned about such liability, they may bring a motion to join Dan Marcum as a nominal defendant.

The demurrer is overruled as to the second cause of action for elder abuse.

> The Elder Abuse Act defines abuse as "[p]hysical abuse, *neglect,* financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" (Welf. & Inst.Code, § 15610.07, subd. (a), italics added); or "[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering" (*id.,* § 15610.07, subd. (b)). The Act defines neglect as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (*Id.,* § 15610.57, subd. (a)(1).) "Neglect includes, but is not limited to, all of the following: [¶] (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. [¶] (2) Failure to provide medical care for physical and mental health needs.... [¶] (3) Failure to protect from health and safety hazards. [¶] (4) Failure to prevent malnutrition or dehydration." (*Id.,* § 15610.57, subd. (b).) In short, neglect as a form of abuse under the Elder Abuse Act refers "to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34, 82 Cal.Rptr.2d 610, 971 P.2d 986 (*Delaney*).)

(*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404, emphasis added.)

The TAC alleges that when admitted to St. Agnes, Dorothy came in with a physician's order for life sustaining treatment, and confirmed her wishes to receive life-saving medical care and treatment. Without authorization, Wimberly told Nareddy that Dorothy should not receive any lifesaving treatment. (TAC ¶¶ 10-13.) Two days after her death, Nareddy retroactively changed Dorothy's medical records to indicate that her wish was for DNR. (TAC ¶ 16.) Plaintiff alleges that Nareddy and St. Agnes failed to comply with Probate Code §§ 4733 and 4736 by failing to comply with her healthcare instructions. (TAC ¶ 42.) Based on these facts Nareddy may be said to have committed neglect of an elder by withdrawing medical care, which is one of the types of neglect specifically mentioned in Welf. & Instit. Code § 15610.57(b). The availability of the enhanced remedies under Welf. & Instit. Code § 15657 is a separate question better addressed in the motion to strike.

The general demurrer to the fourth cause of action is overruled.

To plead professional negligence both the negligent act of the defendant and the harm which resulted must be pled, *Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 154.) Nareddy contends that plaintiff fails to plead fats satisfying these elements. However, the TAC is clear enough in this regard. Alleging that Nareddy disregarded Dorothy's advanced healthcare directive mandating full resuscitation, and withdrew medical care resulting in her death, plaintiff has adequately pled elements of negligent act and resulting harm.

Nareddy also contends that the cause of action was not brought within the statute of limitations. "A complaint disclosing on its face that the limitations period has expired in connection with one or more counts is subject to demurrer." (*Alexander v.*

Exxon Mobil (2013) 219 Cal.App.4th 1236, 1250.) Code Civ. Proc. § 340.5 provides that an action for injury or death based on professional negligence should be commenced within three years after the date of injury or one year after the plaintiff discovers, or should have discovered the injury, whichever comes first.

Dorothy died on 4/30/13, and the initial complaint was filed on 4/27/15. However, the moving papers do not discuss what in the TAC discloses that plaintiff knew or should have known of Nareddy's role in Dorothy's death.

Motion to Strike

Nareddy moves to strike the allegations seeking punitive damages and attorneys' fees.

The court may, upon motion, strike any irrelevant, false or improper matter inserted in a pleading (Code Civ. Proc. § 436(a)), or strike all or part of any pleading not drawn or filed in conformity with the laws of this State and/or the court's prior orders. (Code Civ. Proc. § 436(b); *Lyons v. Wickharst* (1986) 42 Cal.3d 911, 915; *Ricard v. Grobstein, Goldman, Stevenson, Siegel, Levine & Mangel* (1992) 6 Cal.App.4th 157, 162.)

To recover attorneys' fees under Welf. & Institit. Code § 15657, a plaintiff must satisfy the requirements of Civ. Code § 3294. (Welf. & Institit. Code § 15657(c).)

A plaintiff who proves 'by clear and convincing evidence' both that a defendant is liable for physical abuse, neglect or financial abuse (as these terms are defined in the Act) and that the defendant is guilty of "recklessness, oppression, fraud, or malice" in the commission of such abuse may recover attorneys' fees and costs. (Welf. & Institit. Code § 15657(a).)

> To obtain the enhanced remedies of section 15657, "a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; **he or she must show reckless, oppressive, fraudulent, or malicious conduct**." (*Delaney, supra,* 20 Cal.4th at p. 31, 82 Cal.Rptr.2d 610, 971 P.2d 986.) " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur [citations]. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' [Citation.]" (*Id.* at pp. 31–32, 82 Cal.Rptr.2d 610, 971 P.2d 986.)

(*Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, 336-37, emphasis added.)

The TAC alleges that Wimberley changed Dorothy's AHCD from full resuscitation to do not resuscitate, without authority to make that change. Plaintiff alleges that Nareddy was "complicit in this change …" (TAC ¶ 63.) No other allegations are made

regarding the nature of Nareddy's conduct. Generally alleging that all defendants were guilty of recklessness, oppression, fraud and malice is insufficient. (See TAC ¶ 65.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/03/16

(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***People of the State of California v. Casa de Campo, LLC, et al.***

Case No. 15CECG01101

Hearing Date: October 4, 2016 (Dept. 403)

Motion: By Co-Defendant Comerica Bank, as successor-in-interest to Comerica Bank – California, applying for Partial Withdrawal of Deposit of Probable Compensation.

Tentative Ruling:

To grant the application.

Explanation:

[The Court notes that, as of September 30, 2016, no opposition to this application appears in the Court's files.]

The application filed August 25, 2016 requesting a withdrawal of the probable valuation for purposes of paying a debt owed to co-defendant, meets the apparent requirements set forth in CCP §1255.210. It was verified, set forth the County's interest in the property and requested withdrawal of a stated amount. It was also served to the plaintiff and other parties. Moreover, no objection has been received. (CCP § 255.230(q).)

For these reasons the application is granted.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/03/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***SM2 Properties, LLC v. 37 Hotel Fresno, LLC***
Superior Court Case No.: 15CECG00871

Hearing Date: October 4, 2016 (**Dept. 403**)

Motion: Demurrer to second amended complaint by Defendants 37 Hotel Fresno, LLC, and The Intercoastal Group of Companies

Tentative Ruling:

To sustain the general demurrers to the first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action, with leave to amend; to overrule the demurrers to the fourth and eleventh causes of action, with Plaintiffs granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. Allegations in the third amended complaint new or different from those in the second amended complaint are to be set in **boldface** type; any deletions are to be set in ~~strikethrough~~ type.

Explanation:

The first cause of action for fraud – intentional misrepresentation, the second cause of action for fraud – negligent misrepresentation, and the third cause of action for fraud – promise without intent to perform, all fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

These causes of action continue to allege that in reliance on the representations of Defendants 37 Hotel Fresno, LLC, and The Intercoastal Group of Companies ("Defendants"), and the owner of parcel C, Plaintiff SM2 Properties, LLC ("SM2") entered into a contract for the purchase of the property on November 19, 2013, and continued with its plan to construct a Home 2 Suites by Hilton. (Second amended complaint, ¶41.) It is not until October 2014, during a phone conversation between Sonya Gage and Mr. Berger, that Mr. Berger allegedly promised to sign the waiver and modification of the declarations that SM2 alleges is required to obtain the conditional use permit that the second amended complaint is alleging that is preventing SM2 from constructing the hotel occurred. The second amended complaint specifically alleges that the prior letter (exhibit B), in which Defendants confirmed they had "no objection" to the construction of the Home 2 Suites by Hilton was not sufficient for the city to issue SM2 a conditional building permit. (Second amended complaint, ¶¶28, 30-31.)

Consequently, the element of causation is deficient, and the demurrers will be sustained, with leave to amend.

The fourth cause of action for promissory estoppel adequately alleges a valid cause of action. (Code Civ. Proc., § 430.10, subd. (e).

The additional allegations new to the pleading are that SM2 relied on the promise not only to purchase the property, but that SM2 continued to pursue the construction of a Home 2 Suites by Hilton on the subject property due to Defendants' promise to sign a waiver or modification. (Second amended complaint, ¶¶73-74.) This is sufficient to overcome demurrer.

The fifth cause of action for breach of contract and the sixth cause of action for breach of oral contract fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

The written contract cause of action fails because the alleged contract does not contain the term said to have been breached.

The oral contract cause of action alleges only that the oral agreement required Defendants to sign a waiver or modification of the declaration, yet that is the only term of the contract that is alleged. Further, there are no facts from which the conclusory allegation in ¶87 that the oral agreement was entered into prior to SM2's purchase of the property can be inferred and in fact, the allegation of the promise to sign a modification is specially alleged to have occurred in October of 2014, more than a year after SM2 purchased the subject property. (Second amended complaint, ¶28.)

The seventh cause of action for breach of contract fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

There are no terms in the January 25, 2012, option agreement that Defendants provide a waiver or recorded modification or do anything to facilitate the construction of the proposed hotel on the subject property.

The eighth cause of action for negligent interference with prospective economic advantage fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

This cause of action continues to fail to allege wrongful conduct on the part of Defendants. It does not allege an existing economic relationship between Plaintiffs and some third party or parties.

The ninth cause of action for intentional interference with prospective economic advantage fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

The complaint continues to fail to allege that SM2 and some third party or parties were in an economic relationship that probably would have resulted in an economic benefit to SM2. The complaint continues to fail to allege that Defendants knew of the economic relationship between Plaintiff and some third party or parties.

The tenth cause of action for breach of the implied covenant of good faith and fair dealing fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

This cause of action alleges that inherent and implied by law in the written and oral agreements between Gage & Partners, on behalf of themselves and its partnership with SM2, and Defendants, is the covenant of good faith and fair dealing imposing a duty of good faith and fair dealing on each party in its performance of that agreement. Defendants are alleged to have breached the covenant by refusing to cooperate with the construction of a Home 2 Suites by Hilton at the subject property, and by refusing to execute the written waiver or modification of the declaration as they previously agreed.

Yet the January 25, 2012, option agreement does not contain any kind of agreement by Inter-Coastal to cooperate to assist Gage with cooperating with the construction and to execute the written waiver or modification of the declaration; it only provides that Gage may proceed with the project with another partner and confirming that Inter-Coastal would have no interest in the project, financial or otherwise. The covenant cannot be used to vary the terms of the option agreement, and neither of the agreements to the extent they are currently alleged, are to the effect that there was a requirement to cooperate in construction of the hotel at the subject property. (*Carma Developer (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374-376.)

The tenth cause of action for declaratory relief adequately alleges a valid cause of action. (Code Civ. Proc., § 1060.)

Leave to amend

The Court notes that this is Defendants' second demurrer. Leave to amend is limited to three times in response to a demurrer. (Code Civ. Proc., §430.41, subd. (e)(1). Consequently, Plaintiffs are entitled to one additional amendment before they must make the showing described in Code of Civil Procedure section 430.41, subdivision (e)(1).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/03/16

(Judge's initials) (Date)

Tentative Rulings for Department 501

(19) **Tentative Ruling**

Re: ***Salatino v. Petsmart, Inc.***
Court Case No. 14CECG03163

Hearing Date: October 4, 2016 (Department 501)

Motion: 1. By plaintiffs to compel responses from Petsmart to Form Interrogatories, Set No. One,
2. By plaintiffs to compel responses from Petsmart to Special Interrogatories, Set No. One,
3. By plaintiffs to compel responses from Petsmart to Request for Documents, Set No. One.

Tentative Ruling:

To grant and order that verified responses be served by October 11, 2016. To also order that defendant Petsmart and/or its counsel of record pay sanctions of $555 to plaintiffs by that same date.

Explanation:

It was reasonably necessary for plaintiffs to tile this motion to ensure that they received the verifications to the responses given. The failure by defense counsel to monitor the email account of a former employee is not sufficient excuse for failing to serve the verifications in a timely fashion. The opposition also fails to offer the actual verifications to prove they were served or are proper. The amount of sanctions sought is reduced as the time needed to make the motions for verifications should not exceed an hour and a half for one of the experience level found in moving counsel.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/30/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Magdaleno v. Community Medical Centers, Inc.***
Superior Court Case No. 16 CECG 01934

Hearing Date: October 4, 2016 **(Dept. 501)**

Motion: Demurrer to the Original Complaint

Tentative Ruling:

To sustain the special demurrer with leave only for the purpose of filing an amendment to the Complaint naming Jose Santillan Vega as a party plaintiff or a nominal defendant. To overrule the general demurrer to the third cause of action. Upon service of the filing of the amendment, Defendant will have 10 days to file an Answer (plus 5 days if the amendment is served via mail.) [CCP § 1013].

Explanation:

Wrongful Death Cause of Action

Each claimant has a **personal** and **separate** cause of action for decedent's wrongful death. However, as a procedural matter, the actions are deemed "joint, single and indivisible." Under the so-called "one action rule," there cannot be a series of individual wrongful death suits against defendant; instead, *all* claimants generally **must** *join or be joined* in a *single action*. [*Corder v. Corder* (2007) 41 Cal.4th 644, 652; *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201, 1206; *Romero v. Pacific Gas & Elec. Co.* (2007) 156 Cal.App.4th 211, 216]

Defendant has no obligation to locate and join omitted wrongful death claimants (heirs). Rather, the heirs who file the action have a mandatory duty to join all known omitted heirs (those not willing to join as plaintiffs may be joined as "nominal defendants. [*Ruttenberg v. Ruttenberg*, (1997) 53 Cal.App.4th 801 at 808; see *Romero v. Pacific Gas & Elec. Co.*, supra, 156 Cal.App.4th at 216-217] Finally, as a matter of law, a claim for wrongful death cannot be assigned. It is cause of action that is personal to parents, children and other heirs. [*Lewis v. Regional Center of the East Bay* (1985) 174 Cal.App.3d 350; Mayo v. White (5th District1986) 178 Cal.App.3d 1083, 1090.] Therefore, the special demurrer will be sustained with leave to name Jose Santillan Vega as a party plaintiff or a nominal defendant.

Negligent Infliction of Emotional Distress

In a wrongful death action, the plaintiff cannot recover the type of damages available in a "survivor" action; e.g., medical expenses incurred by the decedent (unless paid for by the plaintiff); decedent's wage losses or impaired earning capacity (unless plaintiff was financially dependent upon the decedent); decedent's pain and

suffering and/or damages for disfigurement. [*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Corder v. Corder* (2007) 41 Cal.4th 644, 661; *DeMeo v. St. Francis Hosp.* (1974) 39 Cal.App.3d 174, 176-177]

Importantly, the claimants cannot recover for their personal grief, sorrow and anguish occasioned by the death. The general mental suffering that naturally ensues from a loved one's death is simply not compensable in a wrongful death action. [*Corder v. Corder*, supra, 41 Cal.4th at 661; see *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 199; *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720; *Krouse* v. Graham (1977) 19 Cal.3d 59.] On the other hand, damages are available from the loss of love, companionship, affection and the like. See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 658, (noting that "the line between relevant and irrelevant evidence on these topics may be difficult to draw")]

Ordinarily, a wrongful death plaintiff will not be able to circumvent the barrier of by suing for negligent infliction of emotional distress: i.e., **unless** plaintiff qualifies as a "direct victim" of the third party negligence or a "percipient witness" of the death-provoking event, the alleged mental distress damages cannot be recovered on *any* theory. [*Budavari v. Barry* (1986) 176 Cal.App.3d 849, 852-854, fn. 7] See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.484.

In that case, the sisters and daughters of a patient who died after surgery filed wrongful death causes of action as well as NIED against the hospital and surgeon. The plaintiffs' decedent had undergone thyroid surgery. She was waiting to be brought to her room after surgery when she developed respiratory distress. Her sister and daughter became alarmed and sought help. Only a respiratory therapist responded. By the time the surgeon arrived, their mother was dead. Regarding the NIED claim, plaintiffs claimed that they personally witnessed their decedent's distress due to the nurses' failure to monitor and respond. Prior to trial, plaintiffs settled their claims against the surgeon. After trial, the jury awarded the plaintiffs damages for both the wrongful death and the NIED claims. Id. at 487.

On appeal, the First District upheld the verdict. It addressed the law set forth in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, *Thing v. La Chusa* (1989) 48 Cal.3d 644and *Bird v. Saenz* (2002) 28 Cal.4th 910. The court stated that Bird, supra does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. *Keys*, supra at 489. In the end, the appellate court found that the evidence of the serious emotional distress suffered by the plaintiffs supported the verdict. Id. at 491. Therefore, nothing categorically bars the maintenance of a cause of action for wrongful death and a cause of action for NIED. The general demurrer will be overruled.

Pursuant to California Rules of Court, rule 3.1312, subd.(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 09/30/16

(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Nannini v. Arbor Faire Senior Apartments, et al.***
Case No. 15 CE CG 01104

Hearing Date: October 4th, 2016 (Dept. 501)

Motion: Defendant Feland Properties' Demurrer and Motion to Strike Portions of Second Amended Complaint

Tentative Ruling:

To sustain Feland's demurrer to the second cause of action, with leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc. § 430.10, subd.'s (e), (f).) To grant Feland's motion to strike the allegations and prayer for punitive damages, with leave to amend. (Code Civ. Proc. §§ 435, 436.)

In light of the tentative ruling on Feland's demurrer, GSF's request to join Feland's demurrer is moot. Moreover, GSF's renewed demurrer is also moot and should be taken off calendar.

Plaintiff shall serve and file her third amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Demurrer: First, while plaintiff objects to the demurrer and motion to strike because they are allegedly untimely, defense counsel has submitted his declaration in which he states that he asked for a 14-day extension of time to file his demurrer, and plaintiff granted the extension. (Parra Reply decl., ¶¶ 3, 4.) The emails attached to defense counsel's declaration show that the attorneys agreed to an extension to file the demurrer until August 30th. (Parra Reply decl., Exhibits B and C.) Defendant actually filed the demurrer on August 31st rather than August 30th. However, the demurrer was served and dated on August 30th. Even assuming that demurrer was filed one day late under the parties' agreed deadline, there does not appear to be any prejudice to plaintiff from the delay, and in fact plaintiff was able to file substantive opposition to the demurrer. Therefore, the court finds that the delay in filing the demurrer does not warrant refusing to hear its merits.

Next, with regard to the merits of the demurrer, plaintiff has not alleged sufficient facts to state a cause of action for elder abuse. It is also uncertain exactly what type of elder abuse plaintiff is attempting to allege, since her complaint seems to be attempting to allege either financial abuse or possibly some type of physical abuse.

"The Elder Abuse Act defines abuse as '[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical

harm or pain or mental suffering' (Welf. & Inst. Code, § 15610.07, subd. (a), italics added); or '[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering' (id., § 15610.07, subd. (b))." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404–405.)

However, "To obtain the enhanced remedies of section 15657, 'a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct.' '"Recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur [citations]. Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it." [Citation.]" [Citation.]" (*Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, 336–337.)

Here, plaintiff alleges that, "By the following acts or omissions to act, Defendants, and each of them, negligently and recklessly caused the damage to Plaintiff."

> 1. At the commencement of this action, Plaintiff was an 87 year old adult and an 'elder' as defined in Welfare & Institutions Code §15610.23;
>
> 2. The action will be based upon Defendants' negligent and reckless treatment of Plaintiff from on or about June 30, 2011, whereby Defendants rented Plaintiff an apartment located at 5175 North Feland Avenue, #147, that was previously damaged by moisture and water intrusion, and not repaired properly, and contaminated with black mold. Plaintiff became severely ill and suffered from being exposed to the moisture and water—damaged apartment contaminated by black mold;
>
> 3. The conduct on Defendants' part constituted 'abuse of an elder' as defined in Welfare & Institutions Code §15610.07, including but not limited to, the taking of the property and money of Plaintiff while knowing that this conduct was likely to be harmful to Plaintiff;
>
> 4. Plaintiff first knew of Defendants' abuse on or about April 5, 2013, or thereafter when Plaintiff realized her apartment was and had been damaged by moisture and water intrusion and contaminated with black mold the entire time she lived there;
>
> 5. Plaintiff suffered damages, including but not limited to property damage, special damage by way of medical expense, other special damages and general damages caused by moisture and water intrusion that led to black mold;
>
> 6. In addition to the above described special and general damages, Plaintiff also seeks all available remedies, including the enhanced remedies available

under Welfare & Institutions Code §15657, including attorneys fees, costs, and punitive damages. (SAC, Attachment EA-1, ¶¶ 1-6.)

However, these allegations are not sufficient to support a claim for elder abuse. First, it is not even clear whether plaintiff is alleging that she suffered financial elder abuse because defendants took money from her to rent the apartment, or physical abuse due to the exposure to black mold, or both. The SAC seems to allege that the plaintiff was deprived of money due to defendant's conduct, but there are no allegations that defendants made any fraudulent or false representations to her about the condition of the apartment. Indeed, plaintiff does not even clearly allege that defendants were aware of the presence of dangerous black mold in the apartment, and that it posed an imminent danger of harm to plaintiff. Also, the damages alleged appear to be personal injuries from exposure to the mold, not financial damages from the loss of rent money. Thus, it is uncertain whether plaintiff is alleging financial elder abuse, physical elder abuse, or some other violation of the Elder Abuser Act.

In addition, the facts that have been alleged merely appear to support a claim for negligence against defendants for renting plaintiff an apartment that had damage from water intrusion and black mold. There are no facts alleged showing that defendants knew of the mold and the danger it posed to plaintiff, or that they acted recklessly, or with malice, fraud or oppression in renting the apartment to plaintiff. Therefore, the plaintiff has not sufficiently alleged facts to support a claim for elder abuse, whether financial, physical or otherwise, against defendant Feland. As a result, the court intends to sustain the demurrer to the second cause of action as to Feland for failure to state facts sufficient to state a claim and uncertainty.

Defendant has requested that the court sustain the demurrer to the second cause of action without leave to amend, contending that plaintiff has not been able to state a valid claim despite several attempts and therefore she should not be given another chance to amend. However, plaintiff claims that she can amend the complaint to state more facts to support her claim, and that she should be given an opportunity to amend.

The proposed third amended complaint attached to plaintiff's opposition does add more facts to support the elder abuse claim and appears to address many of the problems pointed out in the demurrer. Therefore, the court intends to sustain the demurrer, but permit plaintiff leave to amend the complaint.[2]

Motion to Strike: Plaintiff has also objected to the allegedly late filing of the motion to strike. Code of Civil Procedure section 435, subd. (b)(1) does require a motion to strike to be filed within the time permitted to respond to a pleading. Here,

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[2] To the extent that defendant GSF Properties has attempted to "join" in Feland's demurrer, the request for joinder is improper. However, given the court's ruling on Feland's demurrer and the fact that plaintiff will be filing a third amended complaint, GSF's attempt to join in Feland's demurrer is moot. In addition, GSF's renewed demurrer will be taken off calendar as moot.

defendant did not file its motion to strike until August 30th, 2016, well over 35 days after the July 12th, 2016 service of the second amended complaint.

However, the attorneys appear to have agreed to extend the deadline for both a demurrer and a motion to strike when they agreed to a 14-day extension of time. Their correspondence mentions "an extension to file a responsive pleading to Plaintiff's Second Amended Complaint." (Exhibit C to Parra Reply decl.) The email also stated that "Defendant Feland's new deadline to respond is August 30, 2016." (*Ibid,* emphasis omitted.) Therefore, although the agreement does not specifically mention which type of pleading challenge defendant was going to raise, the parties agreed to extend the deadline to file "a responsive pleading", which would include both a demurrer and a motion to strike. Consequently, the court finds that the motion to strike was timely filed.

Defendants argues that plaintiff has not alleged any facts to show that it acted with malice, fraud or oppression as required to state a claim for punitive damages under Civil Code section 3294. Indeed, as discussed above with regard to the demurrer, plaintiff's allegations contain no facts showing that defendant made any false representations to plaintiff regarding the condition of the apartment, or that the defendant otherwise acted with malice or oppression. Therefore, the court intends to grant the motion to strike the punitive damages allegations from the SAC.

However, while defendant argues that plaintiff cannot allege any facts to support her request for punitive damages, plaintiff's proposed third amended complaint does include allegations that defendants fraudulently misrepresented that the apartment was suitable and safe for her to rent, when in fact it was unsafe due to mold contamination. (Proposed TAC, ¶¶ 3-6.) Therefore, the court will allow plaintiff to file her proposed TAC and allege more facts showing that defendants acted with fraud, malice or oppression.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/03/16

(Judge's initials) (Date)

Tentative Rulings for Department 502

(28) **Tentative Ruling**

Re: ***Sims v. Autozone, Inc.***

Case No. 14CECG03184

Hearing Date: October 4, 2016 (Dept. 502)

Motion: By Defendant to Compel Second Physical Examination of Plaintiff.

Tentative Ruling:

To grant the motion. Plaintiff shall submit to a physical examination on October 12, 2016, beginning at 12:00 noon, at the offices of Hiram B. Morgan, Jr. M.D., located at 5690 N. Fresno Street, Suite 110, Fresno, California. The examination may be attended by counsel for Plaintiff, shall be limited to the conditions in controversy in this action, is limited to the tests and examinations already conducted in the prior examination, and is otherwise subject to the restrictions of Code of Civil Procedure §2032.220.

Explanation:

(The Court notes that, as of September 30, 2016, no opposition has appeared in the Court's files.)

Defendant has brought a motion to compel a second physical examination. The motion is based on the fact that the medical professional who conducted the previous examination has recused himself due to health conditions.

The Court finds that this constitutes good cause for ordering a second examination and therefore grants the motion to conduct the examination.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/30/16
(Judge's initials) (Date)

(28) Tentative Ruling

Re: ***California Casualty Indemnity Exchange, et al. v. Ching, et al.***

Case No. 15CECG03837

Hearing Date: October 4, 2016 (Dept. 502)

Motion: By Plaintiffs for an order allowing Plaintiffs to deposit the interpleaded funds and restraining adverse claimants from instituting or further prosecuting any action involving the same funds.

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

[The Court notes that, as of September 30, 2016, no opposition or objection to this application appears in the Court's files.]

Plaintiff seeks to be discharged from the case pursuant to California Code of Civil Procedure §§386 & 386.5. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 698.) The effect of this would be to discharge plaintiff from further liability, and to deposit the interpleaded funds in the court's custody until the rights of potential claimants of the moneys can be determined. (*Id.*)

However, Plaintiff has not, as far as can be discerned from the Court's files, actually interpleaded the money at issue in this case, nor has Plaintiff indicated the amount of the moneys to be so interpleaded.

Plaintiff is required to file an affidavit supporting its right to an interpleader. (Code Civ.Proc. §§386, subd.(a); 386.5) The affidavit in support of this motion does not contain any information substantiating its insurance limits or the amount of money to be interpleaded. In short, it does not establish its rights to an interpleader.

Furthermore, several of the parties named as defendants in the complaint were given "courtesy copies" of the motion by mail, but were not, therefore, actually served as they have not yet appeared in the action. One party, Esemeralda Aleman, has since appeared, but the State of California, Department of Healthcare Services and the United States Department of Health and Human Services have, apparently, not yet appeared.

For these reasons, the motion is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 09/30/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Saint Agnes Medical Center v. Data Central Collection Bureau***
Case No. 13 CE CG 02789

Hearing Date: October 4th, 2016 (Dept. 503)

Motion: Plaintiff's Motion for Leave to File Second Amended Complaint

Tentative Ruling:

To grant the motion for leave to file a second amended complaint. (Code Civ. Proc. § 473, subd. (a)(1).) Plaintiff shall file and serve its second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect... The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars…" (Code Civ. Proc., § 473(a).)

" 'Code of Civil Procedure section 473, which gives the courts power to permit amendments in furtherance of justice, has received a very liberal interpretation by the courts of this state.... In spite of this policy of liberality, a court may deny a good amendment in proper form where there is unwarranted delay in presenting it.... On the other hand, where there is no prejudice to the adverse party, it may be an abuse of discretion to deny leave to amend.' [Citation.] 'In the furtherance of justice, trial courts may allow amendments to pleadings and if necessary, postpone trial.... Motions to amend are appropriately granted as late as the first day of trial ... or even during trial ... if the defendant is alerted to the charges by the factual allegations, no matter how framed ... and the defendant will not be prejudiced.' [Citation.]" (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1159.)

Here, plaintiff has sought leave to amend the complaint to allege increased damages under the various contracts. Plaintiff claims that it has learned new information and performed additional analysis of the amounts collected by defendant to arrive at the new figures. The amendment is necessary in order to allow plaintiff to obtain a judgment for the full amount of damages that it seeks. Also, defendant has not made any attempt to oppose the motion to amend or to argue that the amount of

damages is not correct. Therefore, the court intends to exercise its discretion and grant the motion for leave to file the second amended complaint.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/03/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Yellow Book Sales and Distribution Co., Inc. v. Ajua Corporation, et al.***
Court Case No. 10 CECG 03552

Hearing Date: October 4, 2016 (Dept. 503)

Motion: Motion for Assignment Order

Tentative Ruling:

To grant. Square, Inc., and any affiliated corporate entities, are ordered to remit 25% of any and all payments owed to Ajua Corporation dba Ajua Bail Bonds and Raquel Palacios aka Raquel P. Gonzalez, to the judgment creditor, Yellow Book Sales and Distribution Company Co., Inc., as they become due, from the date it is served with this Order until the judgment is satisfied in full.

Judgment debtors, Ajua Corporation dba Ajua Bail Bonds and Raquel Palacios aka Raquel P. Gonzalez, are hereby ordered to provide the judgment creditor's attorney with a written statement under oath every three months listing the judgment debtors' activity with Square, Inc. including, at a minimum, the date, amount, and source or reason of any and all transactions, credits, or deposits on its' Wells Fargo bank account.

Explanation:

An assignment order is a court order assigning to the judgment creditor, or a receiver appointed pursuant to Code of Civil Procedure section 708.610 et seq., the debtor's right to payments due from a third person. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2016) ¶ 6:1422.5.) Assignment orders are authorized by Code of Civil Procedure 708.510 et seq. (Code Civ. Proc., § 708.510, subd. (a).) All or part of a right to payment due, or to become due, may be ordered assigned whether or not such right is conditioned upon future developments. (Code Civ. Proc., § 708.510, subd. (a).) This includes, but is not limited to: accounts receivable. (Code Civ. Proc., § 708.510, subd. (a)(1).)

The court has broad discretion in determining whether to issue an assignment, an in fixing the mount to be assigned. The court: "*may take into consideration all relevant factors*, including the following:

(1) The reasonable requirements of a judgment debtor who is a natural person and of persons supported in whole or in part by the judgment debtor.
(2) Payments the judgment debtor is required to make or that are deducted in satisfaction of other judgments and wage assignments, including earnings assignment orders for support.
(3) The amount remaining due on the money judgment.

(4) The amount being or to be received in satisfaction of the right to payment that may be assigned.

(Code Civ. Proc. § 708.510, subd. (c) (Emphasis added).)

The judgment debtor may claim that all or part of a right to payment is exempt from enforcement of a money judgment. (Code Civ. Proc. § 708.550, subd. (a).) But a noticed motion must be filed to claim an exemption; the judgment creditor must be personally served with the motion at least three days before the hearing on the assignment order application. (Code Civ. Proc. § 708.550.) No claim of exemption has been made here.

Judgment debtors, Ajua Corporation dba Ajua Bail Bonds and Raquel Palacios aka Raquel P. Gonzalez, currently provide services and use Square Inc.'s product to accept mobile payments. Nevertheless, Yellow Book only asks for 25% of the amount of funds paid to the judgment debtors by Square, Inc. be assigned to Yellow Book, which is the maximum amount that could be collected from the take home wages of an employee. (Code Civ. Proc., § 706.050; *Ford Motor Credit Corp. v. Waters* (2008) 166 Capp.App.4th Supp. 1, 13-14.) Given that the amount owed on the judgment is currently in excess of $58,743.71 and the amounts received from Square, Inc. are modest, this assignment order is unlikely to significantly impact individual judgment creditor's support, but will still have some effect in paying down the judgment.

Yellow Book also asks for an accounting under oath from the judgment debtors every 90 days under the court's general inherent power to make all orders necessary to enforce its orders. (Code Civ. Proc. § 187.) This request will be granted.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/03/16

(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Araceli Castellano Zuniga v. Cherry Avenue Auction, Inc., et al.***
Superior Court Case No. 15CECG02779

Hearing Date: October 4, 2016 (Dept. 503)

Motion: Good faith settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

Where nonsettling defendants in an action contest the good faith of a proposed settlement, the moving party must make a more specific showing of the *Tech-Bilt* factors. (See *Tech-Bilt v. Woodward-Clyde & Assoc.* (1985) 38 Cal.3d 488, 499.) This showing requires competent evidence establishing good faith. (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834.)

In the case at bench, moving party applies for a determination of good faith of its proposed settlement with Plaintiff. Moving party has failed to provide sufficient evidence that the proposed settlement is in fact in good faith. The declarations submitted in support of the motion do not demonstrate that the amount of the proposed settlement is based on an approximation of Plaintiff's total recovery. The declarations of moving party's counsel and two of moving party's employees are insufficient to show that the dollar amount proposed is representative of moving party's proportionate liability, as there is no approximation of the total value of Plaintiff's claim, or evidence supporting same. Accordingly, the motion is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/03/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Miller v. Benner***
Superior Court Case No. 16 CECG 00040

Hearing Date: October 4, 2016 **(Dept. 503)**

Motion: By Plaintiff to compel further responses to Special Interrogatories

Tentative Ruling:

To deny the motion.

Explanation:

Pre-requisites for Motion

A Separate Statement was filed as required by CRC 3.1345(c). The "meet and confer" requirement of CCP § 2031.310 has been met. See Exhibits A through D attached to the Declaration of Delja.

Interrogatories at Issue

SPECIAL INTERROGATORY **NO. 5**

Describe the route that you followed from the Red Lobster to the location of the COLLISION on February 17, 2014.

INITIAL RESPONSE TO SPECIAL INTERROGATORY NO. 5

Objection. Vague, ambiguous, overbroad, duplicative, burdensome, oppressive, and intended to harass Responding Party. This interrogatory has, in substance, been previously propounded in Form Interrogatory-General N0. 24 [sic].

FURTHER RESPONSE TO SPECIAL INTERROGATORY NO. 5

Objection. Responding Patty asserts her Fifth Amendment privilege against self-incrimination, as Responding Party currently has a related criminal case pending in Fresno County.

SPECIAL INTERROGATORY **NO. 6**

DESCRIBE every location where you stopped, other than routine traffic stops, between the Red Lobster and the scene of the COLLISION.

INITIAL RESPONSE TO SPECIAL INTERROGATORY NO. 6

Objection. Vague, ambiguous, overbroad, duplicative, burdensome, oppressive, and intended to harass Responding Party. This interrogatory has, in substance, been previously propounded in Form Interrogatory-General N0. 24 [sic].

FURTHER RESPONSE TO SPECIAL INTERROGATORY NO. 6

Objection. Responding Patty asserts her Fifth Amendment privilege against self-incrimination, as Responding Party currently has a related criminal case pending in Fresno County.

Merits

The opposition contends that the Special Interrogatories are duplicative of one of the Form Interrogatories served on April 4, 2016. No. 20.4 asked:

> "Describe the route that you followed from the beginning of your trip to the location of the INCIDENT, and state the location of each stop, other than routine traffic stops during the trip leading up to the INCIDENT."

Defendant responded:

> "To the best of the Responding Party's knowledge, Responding Party was stopped East bound on the shoulder of Adams Avenue preparing to make a U—turn, when the subject accident occurred."

The Defendant is correct that the Special Interrogatories seek the same information requested in Form Interrogatory No. 20.4. The time to compel further response to the Form Interrogatory expired on June 20, 2016. See CCP § 2030.300(c). The party who failed to meet the 45-day deadline cannot "reset the clock" by asking the same questions again in a later set of interrogatories. The failure *waives* the right to compel answers to those questions. [*Professional Career Colleges, Magna Institute, Inc. v. Sup.Ct. (Stewart)* (1989) 207 Cal.App.3d 490, 494] The motion must be denied. The issue regarding the Defendant's invocation of the right against self-incrimination need not be addressed.

Pursuant to California Rules of Court, rule 3.1312, subd.(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 10/03/16
(Judge's initials) (Date)